ORAL ARGUMENT NOT YET SCHEDULED

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

06–1111
(AND CONSOLIDATED CASES)

SPRINT NEXTEL CORPORATION, ET AL.

Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA

Respondents

ON PETITIONS FOR REVIEW FROM THE
FEDERAL COMMUNICATIONS COMMISSION

SAMUEL L. FEDER
GENERAL COUNSEL

JOSEPH R. PALMORE
DEPUTY GENERAL COUNSEL

JACOB M. LEWIS
ASSOCIATE GENERAL COUNSEL

JOHN E. INGLE
DEPUTY ASSOCIATE
GENERAL COUNSEL

NANDAN M. JOSHI
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418–1740

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties

All parties, intervenors, and amici appearing in this Court are listed in the Brief for the Carrier Petitioners.

2. Ruling under review

The petitions for review seek to challenge the FCC's announcement that the December 20, 2004, petition for forbearance filed by the Verizon Telephone Companies was deemed granted by operation of law. *See Verizon Telephone Companies' Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to Their Broadband Services Is Granted By Operation of Law*, News Release (Mar. 20, 2006) (J.A. 32).

3. Related cases

This case has not previously been before this Court. We are not aware of any related case pending before this or any other court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES*

* Cases and other authorities principally relied upon are marked with asterisks.

Cases (cont'd) **Page**

Cases (cont'd) Page

Cases (cont'd) **Page**

Cases (cont'd) **Page**

Administrative Decisions

Constitution, Statutes, and Regulations Page

Statutes (cont'd) Page

U.S. Code:

U.S. Code (cont'd) Page

Regulations:

Others Page

Legislative History:

Dictionaries:

News Articles:

GLOSSARY

1996 Act	Telecommunications Act of 1996
Act	Communications Act of 1934
APA	Administrative Procedure Act
ATF	Bureau of Alcohol, Tobacco, and Firearms
Bureau	The FCC's Wireline Competition Bureau
CALEA	Communications Assistance for Law Enforcement Act
Carrier Petitioners	Sprint Nextel Corporation (petitioner in No. 06–1111); COMPTEL (petitioner in No. 06–1113); Globalcom, Inc., Integra Telecom, Inc., McLeodUSA Telecommunications Services, Inc., MPower Communications Corp., and Pac-West Telecomm, Inc. (petitioners in No. 06–1115); Time Warner Telecom, Inc., Cbeyond Communications, Inc., and Broadview Networks, Inc. (petitioners in No. 06–1167)
FCC (or Commission)	Federal Communications Commission
FEC	Federal Election Commission
ICC	Interstate Commerce Commission
MO&O	Memorandum Opinion and Order
NJDRC	New Jersey Division of Rate Counsel (petitioner in No. 06–1200)

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BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

QUESTIONS PRESENTED

Section 10 of the Communications Act of 1934 (the Act) allows a telecommunications carrier to petition the Federal Communications Commission (FCC or Commission) to "forbear from applying any regulation or any provision of [the] Act" to a telecommunications carrier or a telecommunications service. 47 U.S.C. § 160(a), (c). The Commission must grant a forbearance petition if it finds that certain criteria are satisfied. *Id.* In addition, section 10(c) of the Act provides that "[a]ny such petition shall be deemed granted" if the Commission does not "deny" it "for failure to meet the

requirements for forbearance [in § 10(a)]" within one year of receiving it (plus 90 days if the Commission extends the statutory period). 47 U.S.C. § 160(c).

On March 20, 2006, the FCC's Office of Media Relations issued a news release announcing that a petition for forbearance filed by the Verizon Telephone Companies (Verizon) on December 20, 2004, had been "deemed granted by operation of law" pursuant to § 10(c).

Several carriers (self-described as the Carrier Petitioners) and the New Jersey Division of Rate Counsel (NJDRC) now seek review in this Court. The questions presented are:

(1) Has the FCC entered an "order" subject to review under the Administrative Orders Review Act (Hobbs Act), 28 U.S.C. §§ 2341 *et seq.*, and taken "agency action" subject to judicial review under the Administrative Procedure Act (APA), 5 U.S.C. §§ 551 *et seq.*?

(2) If the FCC has entered an "order" and taken "action," have Petitioners complied with the exhaustion requirement set forth in 47 U.S.C. § 405(a)?

(3) If the Court reaches the merits, (a) did the FCC's news release correctly state that Verizon's forbearance petition had been deemed granted under § 10(c), and (b) if Verizon's petition was deemed granted, is the deemed grant invalid because the Commission did not justify it under the § 10(a) forbearance standards?

(4) Does § 10 violate the principle of separation of powers, the equal-protection component of the Fifth Amendment, or the Tenth or Eleventh Amendments to the U.S. Constitution?

JURISDICTION

As explained below at pages 13–21, the Court lacks jurisdiction because Petitioners do not challenge an FCC "order" within the meaning of the Hobbs Act, 28 U.S.C. § 2342(1), or "agency action" reviewable under the APA.

STATUTORY AND CONSTITUTIONAL PROVISIONS

Pertinent statutory and constitutional provisions not otherwise set forth in the appendices to Petitioners' briefs are reproduced in the appendix to this brief.

COUNTERSTATEMENT

1. The Telecommunications Act of 1996 (the 1996 Act), Pub. L. No. 104–104, 110 Stat. 56, comprehensively revised federal communications laws in an effort to "promote competition and reduce regulation" in the telecommunications industry. *Id.* (title). To promote that effort, the 1996 Act added § 10 to the Communications Act, 47 U.S.C. § 160. Section 10 authorizes the Commission to "forbear from applying any regulation or any provision" of the Communications Act "to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services." 47 U.S.C. § 160(a). Under § 10(a), the Commission "shall" exercise its forbearance authority if it determines that (1) enforcement of a regulation or statutory provision is not necessary to ensure that charges and practices are just, reasonable, and not unreasonably discriminatory, (2) enforcement is not necessary to protect consumers, and (3) forbearance from applying the regulation or provision is consistent with the public interest.

Congress enacted § 10 to give the Commission the authority (and duty) to forbear from enforcing statutes and regulations that are no longer "current and necessary in light of changes in the industry." 141 Cong. Rec. S7893

(June 7, 1995) (remarks of Sen. Pressler). But Congress went further. To "improve the [1996 Act's] deregulatory nature," Congress gave telecommunications carriers the ability to compel the Commission to exercise its authority "to forbear from regulating." 141 Cong. Rec. S8069–70 (June 9, 1995) (remarks of Sen. Pressler). In § 10(c) of the Act, Congress provided that "[a]ny telecommunications carrier, or class of telecommunications carriers, may submit a petition to the Commission requesting that the Commission exercise [its] authority [under § 10(a)] with respect to that carrier or those carriers, or any service offered by that carrier or carriers." 47 U.S.C. § 160(c). Under § 10(c), the "Commission may grant or deny a petition in whole or in part and shall explain its decision in writing." *Id.* But "if the Commission does not deny the petition for failure to meet the requirements for forbearance under [§ 10(a)] within one year after the Commission receives it" (a period that the Commission may extend by 90 days), Congress specified that "[a]ny such petition shall be deemed granted." 47 U.S.C. § 160(c). Congress expected that this "petition driven process" would spur the Commission "to eliminate outdated regulations, and to do so in a timely manner." 141 Cong. Rec. S7898 (June 7, 1995) (remarks of Sen. Dole); *see also* 142 Cong. Rec. S700 (Feb. 1, 1996) (remarks of Sen. Burns) (§ 10(c) "requires speedy action on . . . petitions for forbearance").

2. On December 20, 2004, Verizon filed a forbearance petition under § 10(c) seeking relief from Title II of the Communications Act and the FCC's "*Computer Inquiry*" rules to the extent that they imposed "traditional common

carriage regulations" on Verizon's "broadband services."[1] Verizon contended that applying common-carrier regulation to its broadband services hindered competition, discouraged infrastructure investment, and hurt consumers.[2] After the FCC's Wireline Competition Bureau (the Bureau) issued a public notice inviting comment on Verizon's petition,[3] a number of parties filed comments and reply comments in the proceeding. For its part, Verizon clarified in its reply comments that it was not seeking relief from "various public policy obligations," including its "911, Emergency Alert System, or . . . Universal Service Fund" responsibilities.[4] Verizon also acknowledged that, because the Communications Assistance for Law Enforcement Act (CALEA), 47 U.S.C. §§ 1001 *et seq.*, "appl[ies] more broadly than" Title II's common-carrier provisions, Verizon's CALEA obligations "would still apply to [its] broadband services after forbearance."[5]

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[1] Petition of the Verizon Telephone Companies for Forbearance, WC Docket No. 04–440 (Forbearance Pet.), at 1 (J.A. 3). Title II of the Communications Act, 47 U.S.C. §§ 201–276, generally sets forth the statutory framework for the Commission's regulation of common carriers. The Commission's *Computer Inquiry* rules regulate the provision of "enhanced services" by common carriers. *See generally National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 976 (2005).

[2] Forbearance Pet. at 2–3 (J.A. 4–5).

[3] *Comments Invited on Petition for Forbearance Filed by the Verizon Telephone Companies with Respect to Their Broadband Services*, 19 FCC Rcd 24935 (Wireline Competition Bur. 2004) (J.A. 28).

[4] Reply Comments of Verizon in Support of its Petition for Forbearance, WC Docket No. 04–440 (Mar. 10, 2005) (Verizon Reply Comments), at 31 (J.A. 114). Verizon requested that these public-policy obligations be applied equally to all broadband providers. *Id.* (J.A. 114).

[5] Verizon Reply Comments at 31–32 (J.A. 114–115). The Carrier Petitioners are therefore incorrect in asserting (at 5) that the deemed grant in this case exempted Verizon from its statutory and regulatory obligations under CALEA.

On December 19, 2005, the Bureau extended the deadline under § 10(c) for Commission action on Verizon's petition by 90 days, to March 19, 2006.[6] During this period, Verizon submitted a letter identifying ten specific services for which it sought forbearance and further clarifying that it was "seeking forbearance from the mandatory application of Title II common-carriage regulation in order to have the flexibility to provide the broadband services at issue on a common-carriage or private-carriage basis."[7]

Under the agency's practice, FCC commissioners do not vote directly on whether to grant or deny a forbearance petition. Rather, the agency's staff, under the direction of the FCC chairman, prepares and circulates to the commissioners a draft order that sets forth the staff's recommended disposition of the forbearance petition in light of its analysis of the record in the proceeding. The commissioners then vote on whether to adopt the staff's recommendations (with or without modification) or to reject them. Under long-standing Commission practice, a draft order must receive the affirmative votes "of a majority of [commissioners] present" to be adopted as an official Commission order. *WIBC, Inc. v. FCC*, 259 F.2d 941, 943 (D.C. Cir.) (en banc), *cert. denied*, 358 U.S. 920 (1958).

In this case, more than three weeks before the March 19 deadline, the Wireline Competition Bureau circulated a draft Memorandum Opinion & Order (MO&O) to the Commission that would have granted Verizon's petition

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[6] *Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, 20 FCC Rcd 20037 (Wireline Competition Bur. 2005) (J.A. 30).

[7] Letter from Edward Shakin, Vice President & Associate General Counsel, Verizon, to Marlene Dortch, Secretary, FCC, WC Docket No. 04–440 (filed Feb. 7, 2006), at 3 (J.A. 159).

in part and denied it in part.[8] As of the March 19 deadline, only Chairman Martin and Commissioner Tate had voted to adopt the draft MO&O. Commissioners Copps and Adelstein cast votes against its adoption.[9] (The fifth seat on the Commission was vacant at the time, but has since been filled.) Because a majority of commissioners did not support the Bureau's proposal, the draft MO&O was not adopted as a Commission order. *See* FOIA Letter, Attachment.

On March 20, 2006, the FCC's Office of Media Relations issued a one-page news release "inform[ing] the public that, pursuant to § 10(c), the relief requested in Verizon's petition was deemed granted by operation of law, effective March 19, 2006." News Release (J.A. 32). In addition, all four commissioners released separate statements expressing their views on the deemed grant of Verizon's petition, which they unanimously believed had occurred as a result of the Commission's failure to deny it within the statutory period. In a joint statement, Chairman Martin and Commissioner Tate said that, although it "would have been preferable to have reached consensus," the forbearance relief that Verizon had obtained under § 10(c) would have the salutary effect of encouraging new investment in broadband infrastructure. Joint Statement at 2 & n.10 (J.A. 34). Commissioner Copps expressed his "disappoint[ment]" that Verizon's forbearance petition had not been resolved by an "appealable [o]rder," but had been deemed granted because of the

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[8] *See* Letter from Kevin J. Martin, Chairman, FCC, to The Honorable Daniel K. Inouye, Chairman, & The Honorable Ted Stevens, Vice-Chairman, of the Senate Comm. on Commerce, Science & Transp. (Mar. 12, 2007), Att. at 1 (reproduced in relevant part in App. 2, hereto).

[9] *See* Letter from Anthony J. Dale, Managing Director, Office of Managing Director, FCC, to Anne M. Staron, Legal Ass't, Willkie, Farr & Gallagher, LLP (Jan. 31, 2007), Attachment (FOIA Letter) (reproduced in App. 2, hereto).

Commission's "failure to act." Statement of Commissioner Copps at 1–2 (J.A. 35–36). Commissioner Adelstein likewise stated that he was "disappointed that we allow this petition to grant by default rather than issuing a Commission order to address the request." Statement of Commissioner Adelstein at 3 (J.A. 40). Both Commissioners Copps and Adelstein said they feared that forbearance would harm Verizon's customers. *See* Copps Statement at 1–2 (J.A. 35–36); Adelstein Statement at 1–2 (J.A. 38–39).

Press coverage at the time reported that the Commission had taken a vote on a proposed order disposing of the forbearance petition but that the participating commissioners had deadlocked 2–2.[10]

SUMMARY OF ARGUMENT

Consistent with the deregulatory purpose of the 1996 Act, the forbearance mechanism in § 10 allows telecommunications carriers to ask the FCC to forbear from enforcing outmoded statutory and regulatory provisions. At the same time, Congress set a deadline for FCC action on such petitions and provided that "[a]ny such petition shall be deemed granted" if the Commission does not "deny the petition for failure to meet the requirements for forbearance" within the statutory period. 47 U.S.C. § 160(c). In this case, the four members of the Commission were evenly divided on a draft order and could not reach a majority on a final disposition of Verizon's forbearance petition before the deemed-granted provision in § 10(c) took effect. As the

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[10] *See* Howard Buskirk, *Analysts Say Questions Remain about Long Term Effect of Verizon Forbearance Petition*, Communications Daily, Mar. 22, 2006 (Communications Daily Article) (available on Westlaw, 2006 WLNR 4684851); *id.*, Washington Internet Daily, Mar. 22, 2006 (same article) (available on Westlaw, 2006 WLNR 10305007); *see also* Amy Schatz, *FCC Deregulates Verizon's Big-Business Market*, Wall Street Journal, Mar. 21, 2006, at A3 (observing that "the FCC's two Democrats voted against the measure").

agency's news release announced at the time, Verizon's petition was therefore deemed granted pursuant to the plain terms of § 10(c).

Petitioners seek judicial review of the deemed grant as if the Commission had taken action and issued an order disposing of Verizon's petition. But the Commission did not issue an order, and it did not otherwise act. Instead, as the result of a statutory mechanism that Congress designed to expedite Commission decisionmaking and promote deregulation, Verizon's petition was deemed granted by operation of law. This Court lacks jurisdiction to determine that the automatic operation of a federal statute is "arbitrary and capricious" under the APA, nor is it empowered to address arguments that have not been first presented to the Commission for its consideration. The petitions for review should therefore be dismissed.

I. Under 47 U.S.C. § 402(a) and the Hobbs Act, 28 U.S.C. § 2342(1), the Court has jurisdiction to review and set aside final FCC "orders." The Commission adopts "orders" when it exercises its authority under the Communications Act to decide questions of legal significance. There is no order here because the Commission did not render any decision on Verizon's forbearance petition. The FCC's news release and the commissioners' separate statements are not reviewable orders because they do not embody any FCC decision, and they do not affect legal rights and obligations. In addition, a deemed grant pursuant to § 10(c) cannot constitute an order because it occurs only when the Commission *fails to decide* within the statutory period whether to deny a forbearance petition under the § 10(a) criteria.

For the same reasons, the Commission has not taken "agency action" that is reviewable in federal court under the APA. The news release and the separate statements lack the legal significance necessary to produce

reviewable agency action, and the Commission's failure to act on Verizon's forbearance petition is not amenable to arbitrary-and-capricious review. And because Congress is not an agency under the APA, the deemed grant of Verizon's forbearance petition under § 10(c) cannot be "agency action" subject to APA review.

II. Even if the FCC had issued a reviewable order, Petitioners would not be able to challenge it because they did not comply with the exhaustion requirement set forth in 47 U.S.C. § 405(a). Petitioners never presented the Commission with their argument that the commissioners' 2–2 vote on the draft MO&O had the effect of *denying* Verizon's forbearance petition within the meaning of § 10(c). Nor did they argue that a deemed grant under § 10(c) is valid only if the Commission concludes that it satisfies the § 10(a) forbearance criteria. Section 405(a) contains no exceptions to the exhaustion requirement. And even if exceptions were read into § 405(a), Petitioners have not offered any valid basis for excusing their failure to exhaust in this case.

III. If the Court reaches the merits, it should affirm the FCC commissioners' reasonable (and unanimous) view that Verizon's petition had been deemed granted under § 10(c)—and not denied by their 2–2 vote on the draft MO&O. The 2–2 vote prevented the Commission from adopting the draft MO&O as a Commission order, but it did not deny Verizon's petition under § 10(c) because the FCC makes decisions only by taking action that is supported by a majority of participating commissioners. Section 10(c) confirms this practice by providing that a decision to deny must be made by the "Commission" (*i.e.*, in its institutional capacity) "for failure to meet the requirements for forbearance" and requiring that the "Commission" explain "its" decision in writing. The four commissioners reasonably concluded that there was no such denial in this case.

The Court should also reject the argument that a forbearance petition may be deemed granted under § 10(c) only if the Commission justifies it under the § 10(a) forbearance criteria. Section 10(c) states unambiguously that "[a]ny" forbearance petition filed under § 10(c) "shall be deemed granted" if it is not timely denied. Nothing in the statutory text conditions the validity of the deemed grant on the Commission's application of the § 10(a) forbearance standards.

IV. Petitioners' constitutional arguments are without merit.

A. The canon of constitutional avoidance cannot be used to engraft a judicial-review provision onto § 10. When it applies, the canon can lead a court to adopt one reasonable construction of a statute over another. The canon has no place here because if § 10 were interpreted to provide for judicial review of a deemed grant, a reviewing court would have to reverse *every* deemed grant for lack of a reasoned agency explanation. A construction that produced this outcome is unreasonable.

Moreover, the canon of constitutional avoidance does not apply because there is no serious likelihood that § 10 would be held unconstitutional absent judicial review of a deemed grant. Because a deemed grant is the result of Congress's exercise of legislative power, not the agency's exercise of delegated authority, a deemed grant does not raise any nondelegation concerns. Nor does § 10(c) diminish the constitutional importance of the § 10(a) forbearance standards: Those standards continue to fulfill their constitutional role of guiding the Commission's exercise of decisionmaking authority under § 10(a). Section 10(c) also presents no serious issue under the Presentment Clause because a grant of forbearance does not repeal or amend any provision of the Communications Act.

B. The NJDRC's constitutional challenges to § 10 are unfounded. Congress could rationally limit the § 10(c) petition process to telecommunications carriers on the ground that regulated carriers are in the best position to promote § 10's goal of encouraging the Commission to forbear from outdated telecommunications regulation. The NJDRC's Tenth and Eleventh Amendment arguments are insubstantial: States have no Tenth Amendment right to enforce federal law, and the states' Eleventh Amendment immunity to suit has no bearing on the constitutionality of a grant of forbearance under § 10.

STANDARD OF REVIEW

Had the Commission taken reviewable action in this case, its interpretation of the Communications Act would have been governed by *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, if the intent of Congress is clear, then "the court, as well as the agency, must give effect to [that] unambiguously expressed intent." *Id.* at 842–843. If, however, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. "*Chevron* requires a federal court to accept the agency's [reasonable] construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Brand X Internet Servs.*, 545 U.S. at 980; *see also Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 127 S. Ct. 1513, 1522 (2007).

In addition, reviewable actions may be reversed if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

This Court's review of constitutional issues over which it has jurisdiction is *de novo*. *Dr. Pepper/Seven-Up Cos., Inc. v. FTC*, 991 F.2d 859, 862 (D.C. Cir. 1993).

ARGUMENT

I. THE COURT LACKS JURISDICTION TO ENTERTAIN PETITIONERS' CLAIMS

To get into court, Petitioners have invoked the statutory procedure that Congress established for challenging FCC decisionmaking. They ask this Court to assert jurisdiction under 47 U.S.C. § 402(a) and the Hobbs Act, which authorize the Court to review final FCC "orders," 28 U.S.C. § 2342(1), and under the APA, which provides a federal cause of action by which persons aggrieved may challenge final "agency action," 5 U.S.C. § 702. But Petitioners have not identified any "order" or "agency action" for this Court to review. Nor could they have done so, because the "deemed grant" that aggrieves them occurred by operation of law. "A federal court's subject-matter jurisdiction . . . extends only so far as the Congress provides by statute."[11] Because Congress did not authorize this Court to review the automatic operation of a federal statute as if it were FCC decisionmaking, the Court should dismiss the petitions for review for lack of jurisdiction.

A. The Commission Has Not Entered an "Order" under 47 U.S.C. § 402(a) and the Hobbs Act

Section 402 of the Communications Act, 47 U.S.C. § 402, sets forth the procedure for seeking judicial review of FCC decisions. Section 402(a) provides that "[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the Commission"—with certain exceptions not relevant here, *see* 47

[11] *Friends of the Earth v. EPA*, 333 F.3d 184, 187 (D.C. Cir. 2003) (bracket omitted) (quoting *Commodity Futures Trading Comm'n v. Nahas*, 738 F.2d 487, 492 (D.C. Cir. 1984)).

U.S.C. § 402(b)—"shall be brought as provided by and in the manner prescribed in" the Hobbs Act. The Hobbs Act, in turn, grants to the courts of appeals "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all final [FCC] orders" made reviewable under § 402(a). 28 U.S.C. § 2342(1). Under the Hobbs Act, the reviewing court's jurisdiction is invoked when a "party aggrieved by the final order" files a timely "petition to review the order in the court of appeals." 28 U.S.C. § 2344.

Each of those provisions—which Petitioners invoke, *see* Carrier Pets. Br. 1–2, NJDRC Br. 2—makes clear that the existence of an FCC "order" is a prerequisite to the Court's exercise of Hobbs Act jurisdiction.[12] An "order" does not arise simply because the Commission has instituted an administrative proceeding. Rather, the Commission produces an "order" when it authoritatively decides a question of legal significance—for example, when it adopts regulations or adjudicates controversies.[13] That is what the term "order" meant when Congress enacted the Communications Act, *see, e.g.*, Black's Law Dictionary 1298 (3d ed. 1933) (defining "order" as a "mandate, precept; a command or direction authoritatively given; a rule or regulation"), and that is its modern meaning, Black's Law Dictionary 1096 (6th ed. 1990) (same definition). Thus, this Court has explained that a Hobbs Act "order" entails more than the "unofficial expression of the views" of an FCC commissioner; it arises only when the agency makes a "decisional

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[12] *See Columbia Broad. Sys., Inc. v. FCC*, 316 U.S. 407, 415 (1942) (*CBS*) (a "suit cannot be maintained unless" there is an "order" under § 402(a)).

[13] *See id.* at 420 ("reviewable orders are 'an exercise either of the quasi-judicial function of determining controversies or of the delegated legislative function of rate making and rule making'") (quoting *United States v. Los Angeles & Salt Lake R.R. Co.*, 273 U.S. 299, 309 (1927)).

pronouncement affecting legal rights and obligations." *Illinois Citizens Comm. for Broad. v. FCC*, 515 F.2d 397, 402 (D.C. Cir. 1975) (*Illinois Citizens*).

Although Petitioners invoke the Hobbs Act, their briefs do not identify the "decisional pronouncement" that they contend has affected their "legal rights and obligations." In the petitions for review, Petitioners portrayed the news release and the commissioners' separate statements as the relevant FCC orders in this case. *See* 28 U.S.C. § 2344 ("The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency."). But these documents are not Hobbs Act orders. The news release was issued by the FCC's press office; it was not voted on or adopted by the Commission. Nor did the news release purport to "decide" anything. Its sole purpose was to "inform the public" that Verizon's forbearance petition had been deemed granted under § 10(c).[14] The release of that information affected none of Petitioners' legal rights and obligations; the deemed grant would have occurred even if there had been no press release announcing it.

Likewise, the separate statements are simply "unofficial expression[s]" of the commissioners' personal views and, as such, have no effect on Petitioners' "legal rights and obligations." *Illinois Citizens*, 515 F.2d at 402. As this Court has observed, a regulatory commission "is an entity apart from its members, and it is its institutional decisions—none other—that bear legal significance." *Public Serv. Comm'n of N.Y. v. Federal Power Comm'n*, 543 F.2d 757, 776 (D.C. Cir. 1974) (*NYPSC*). "By institutional decisions," this Court means "a decision by a majority vote duly taken." *Id.* Here, none of the commissioners'

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[14] News Release (J.A. 32). The FCC's news releases are issued for the purpose of "encouraging and facilitating media dissemination of Commission announcements, orders, and other information." *See* FCC, Office of Media Relations, http://www.fcc.gov/omr/.

statements was put to a Commission vote, nor did any of them even informally command the support of a majority of commissioners. The statements are not "orders" under the Hobbs Act.

Nor may Petitioners challenge the deemed grant itself as if it were a reviewable FCC order. A deemed grant is neither a "decisional pronouncement" by the FCC, *Illinois Citizens*, 515 F.2d at 402, nor the result of the Commission's exercise of delegated authority, *CBS*, 316 U.S. at 420.[15] Nor is it the "Commission's disposition of Verizon's [p]etition," as Petitioners contend. Carrier Pets. Br. 2; NJDRC Br. 2. Rather, a deemed grant is a congressional directive that takes effect when the Commission *fails to adopt an order* within the statutory period denying a forbearance petition under the § 10(a) forbearance standards.[16] And a congressional directive is not an FCC "order" that this Court may "enjoin, set aside, annul, or suspend" under § 402(a) and the Hobbs Act. 47 U.S.C. § 402(a); *see also* 28 U.S.C. § 2349(a).

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[15] The Court has indicated that it may dispense with the need for an agency "pronouncement" where circumstances reveal that the agency is refusing to acknowledge a decision it has actually made. *See Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987) (citing *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093, 1099 (D.C. Cir. 1970)). But the Court has never held that an unalloyed failure to act by the FCC can give rise to an "order" under § 402(a) and the Hobbs Act. *See In re Tennant*, 359 F.3d 523, 527 (D.C. Cir. 2004) ("But because Tennant's whole point is that the FCC has not taken action he believes it should have, there was no order from which he could have taken an appeal.").

[16] *See, e.g.*, *Executive Nat'l Bank v. Board of Governors of the Fed. Reserve Sys.*, 889 F.2d 556, 559 (5th Cir. 1989) ("Because [as a result of an application being deemed granted] there is no order of the Board from which ENB may properly appeal under § 1848, we dismiss its Petition for Review and Request for Declaratory Judgment"); *BankAmerica Corp. v. Board of Governors of the Fed. Reserve Sys.*, 596 F.2d 1368, 1374 (9th Cir. 1979) ("In the absence of an order, § 1848 did not entitle BankAmerica to petition the court directly.").

B. The Commission Has Not Taken "Agency Action" Reviewable under the APA

The APA states that a person "adversely affected or aggrieved by agency action . . . is entitled to judicial review thereof." 5 U.S.C. § 702. The APA further provides that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review." 5 U.S.C. § 704. In addition, the APA authorizes reviewing courts to "hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The APA thus permits judicial review to the extent that a person aggrieved is challenging "agency action." Petitioners invoke these APA provisions, but, again, they fail to identify any "agency action" that this Court or any other could "hold unlawful and set aside" under arbitrary-and-capricious review. The petitions for review must therefore be dismissed for this reason as well.

1. The APA defines "agency action" to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). Except for a "failure to act," which is addressed below, each of the types of "agency action" defined in the APA—rule, order, license, sanction, and relief—requires an affirmative act "of an agency." *See* 5 U.S.C. §§ 551(4), (6), (8), (10), (11). Likewise, an "equivalent" or a "denial" of one of these defined actions requires a discrete act by the agency. *See Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 62 (2004) (*SUWA*).

Here, the only discrete actions taken by the FCC were the staff's issuance of the news release and the commissioners' release of their separate

statements.[17] These "actions," however, are not "the types of agency action suitable for review" under the APA for much the same reason that the news release and separate statements are not "orders" under the Hobbs Act, *i.e.*, they are "legally insignificant," "purely informational," and have no "concrete impact" or "binding effect" on any party. *Independent Equipment Dealers Ass'n v. EPA*, 372 F.3d 420, 426–427 (D.C. Cir. 2004); *see also AT&T Corp. v. FCC*, 369 F.3d 554, 561 (D.C. Cir. 2004) (holding that the FCC's public notice that a statute had sunset by operation of law was not a reviewable agency decision); *Farmers Export Co. v. United States*, 758 F.2d 733, 737 (D.C. Cir. 1985) ("By failing to reach a decision on the merits the Commission's decision does not impose an obligation, deny a right, or fix any legal relationship."); *New York Dock Ry. v. United States*, 696 F.2d 32, 34 (2d Cir. 1982) ("Since a majority of the [Interstate Commerce Commission (ICC)] failed to agree on the merits of petitioners' objections, we have no final decision of the Commission to review.").

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[17] Although the Carrier Petitioners contend that the Commission's 2–2 vote resulted in a denial of Verizon's petition, *but see infra* Sections II & III, they do not point to this purported "denial" as the reviewable agency action they here challenge. Only a "person aggrieved" may challenge agency action under the APA. 5 U.S.C. § 702; *see also* 28 U.S.C. § 2344; *American Orient Express Ry. v. Surface Transp. Bd.*, 484 F.3d 554, 557 n.3 (D.C. Cir. 2007). FCC action *denying* Verizon's forbearance petition would not "aggrieve" the Carrier Petitioners. *See BankAmerica Corp.*, 596 F.2d at 1374 ("Similarly, viewing Board delay as tantamount to an order of approval would not enable BankAmerica to petition this court under § 1848, because BankAmerica would not be 'aggrieved by [such] an order.'"). The Carrier Petitioners therefore challenge only (1) "[t]he FCC's characterization and treatment of Verizon's [p]etition as a 'deemed grant,'" Carrier Pets. Br. 21, *i.e.*, the press release and separate statements; and, in the event the Court disagrees with that first argument, (2) the "deemed grant" itself, *id.* at 24.

2. As mentioned, the APA includes as "agency action" an agency's "failure to act," a term that encompasses a failure to "take some decision by a statutory deadline." *SUWA*, 542 U.S. at 63.

Petitioners understandably have not asked the Court to "review" the FCC's "failure to act" in this case. Although the "APA provides relief for a failure to act in [5 U.S.C.] § 706(1)," the only relief it authorizes is an order "'compel[ling] agency action unlawfully withheld or unreasonably delayed.'" *SUWA*, 542 U.S. at 62 (quoting § 706(1)). Petitioners, however, do not seek a court order under § 706(1) directing the Commission to act on Verizon's petition now.[18] Rather, they ask the Court to engage in arbitrary-and-capricious review under 5 U.S.C. § 706(2) and to "set aside" (*see id.*) the deemed grant that resulted from the Commission's failure to act within the statutory period. *See* Carrier Pets. Br. 2, 5, 15; NJDRC Br. 9. This remedy is unavailable in a failure-to-act case. *See United States v. Bean*, 537 U.S. 71, 77 (2002).

In *Bean*, the Supreme Court made clear that an agency's "failure to act" cannot be treated as an affirmative agency act for purposes of arbitrary-and-capricious review. In that case, the Supreme Court interpreted 18 U.S.C. § 925(c), which authorized judicial review when a request for a waiver of a ban on firearms possession "is denied by" the Bureau of Alcohol, Tobacco, and Firearms (ATF). *Bean*, 537 U.S. at 74. Congress had prohibited ATF from using appropriated funds to act on such waivers, so ATF returned Bean's

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[18] A court can only compel agency action that the agency is "required to take," *SUWA*, 542 U.S. at 64, and only if the petitioner has shown a "clear and indisputable" right to a writ of mandamus granting such relief, *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988) (internal quotation marks omitted). Petitioners have not attempted to make this showing.

waiver application without evaluating its merits. *Id.* at 75. Bean then sought judicial review under § 925(c), arguing that "ATF's failure to act constitute[d] a 'denial'" of his waiver request, *id.* at 75, because it had "precisely the same impact on [him] as denial on the merits," *id.* at 76 (brackets and internal quotation marks omitted). In a unanimous decision, the Court declined to treat ATF's failure to act as a denial under § 925(c), concluding instead that § 925(c) should be interpreted in light of the distinction drawn in the APA "between a 'denial' and a 'failure to act.'" *Id.* at 76 n.4. Indeed, the Court observed that "judicial review under § 925(c) *cannot* occur without a dispositive decision" by ATF because the APA's "'arbitrary and capricious' test in its nature contemplates review of some *action* by another entity." *Id.* at 77 (emphases added). *Bean* thus forecloses any possibility that the FCC's "failure to act" in this case can be viewed as "action" that is subject to arbitrary-and-capricious review under the APA.

3. A deemed grant is not itself "agency action" under the APA. *See* Carrier Pets. Br. 2, 24; NJDRC Br. 2. A deemed grant occurs automatically by operation of an Act of Congress, and Congress is not an "agency" whose decisions are subject to APA review. 5 U.S.C. § 701(b)(1)(A).

This Court's holding in *AT&T Corp.*, 369 F.3d 554, makes that plain. In that case, AT&T sought APA review after the sunset provision in 47 U.S.C. § 272(f)(1) took effect. The sunset provision specified that certain regulatory safeguards set forth in § 272 "shall cease to apply" at the end of a 3-year statutory period "unless the Commission extends such 3-year period by rule or order." AT&T argued that "because the Commission has the authority to extend" the sunset period, "it necessarily must reach a decision not to extend" when it fails to act and permits the sunset to take effect. 369 F.3d at 560. The Court rejected that argument and dismissed AT&T's APA claims for the

straightforward reason that "the § 272 safeguards sunset 'by operation of law,' not by Commission action." *Id.* at 556; *see also id.* at 560 ("The main point here is that § 272 safeguards expired by 'operation of law,' not by decision of the FCC.").[19]

Petitioners' APA claims in this case must be dismissed for the same reason. Although Congress did not make policy decisions about individual forbearance petitions, *see* Carrier Pets. Br. 32, it did incorporate an operation-of-law mechanism into the forbearance process in order to encourage timely Commission action and advance the 1996 Act's deregulatory purposes. Petitioners may disagree with Congress's policy choices and with its decision to use the deemed-grant device to promote its interest in deregulation. As in *AT&T Corp.*, however, Petitioners' quarrel lies with decisions made by Congress, not with any "agency action" taken by the FCC.

Because Petitioners fail to identify any reviewable agency "action," their APA claims must be dismissed.

II. PETITIONERS' APA CLAIMS ARE BARRED BY THE EXHAUSTION REQUIREMENT IN 47 U.S.C. § 405(a)

As shown above, the Commission has not issued a Hobbs Act "order" or otherwise taken any reviewable "agency action." But even if the Court concludes that there was both an "order" and an "action" in this case, the exhaustion requirement in § 405(a) of the Communications Act, 47 U.S.C. § 405(a), would deprive the Court of jurisdiction to decide Petitioners' APA claims. Section 405(a) provides that the "filing of a petition for

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[19] *See also Natural Resources Defense Council, Inc. v. EPA*, 859 F.2d 156, 214 (D.C. Cir. 1988) (holding that the EPA could extend a license pending renewal under the Clean Water Act without applying that statute's "stringent test" for license renewals because, in 5 U.S.C. § 558(c), Congress provided that, while a renewal application is pending, "the expired permit is continued, not by affirmative agency action, but by operation of law").

reconsideration" is a "condition precedent to judicial review of any [FCC] *order*, decision, report, or *action* . . . where the party seeking such review . . . relies on questions of fact or law upon which the Commission . . . has been afforded no opportunity to pass." *Id.* (emphases added). Under § 405(a), this Court "generally lack[s] jurisdiction to review arguments that have not first been presented to the Commission." *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1182 (D.C. Cir. 2003). Because Petitioners did not file a reconsideration petition after the Commission issued its "order" or took its "action," they may not assert their APA claims here.

A. Section 405(a) bars the Carrier Petitioners' argument (at 22) that the Commission's split vote on the Bureau's draft order had the effect of denying Verizon's forbearance petition under § 10(c) and that the Commission's press release was therefore incorrect. The Carrier Petitioners concede (at 22) that they never presented this argument to the agency. Nonetheless, they ask the Court to make an "exception" to § 405(a)'s exhaustion mandate in this instance because, they assert, they learned of the Commission's vote after the time for filing reconsideration petitions had passed. This argument is flawed for two reasons.

First, § 405(a) contains no exception to its exhaustion requirement. To be sure, some of this Court's opinions, in seeking to harmonize § 405(a) and judicial exhaustion principles, have suggested that § 405(a) incorporates traditional exceptions to the exhaustion requirement.[20] However, the Supreme Court recently has made clear that statutory exhaustion requirements are not subject to the traditional common-law exceptions that apply to non-statutory exhaustion. Courts may not "read futility or other

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[20] *See, e.g.*, *Chadmoore Communications, Inc. v. FCC*, 113 F.3d 235, 239 (D.C. Cir. 1997).

exceptions into statutory exhaustion requirements where Congress has provided otherwise." *Booth v. Churner*, 532 U.S. 731, 741 n.6 (2001); *see also McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) ("Of 'paramount importance' to any exhaustion inquiry is congressional intent. Where Congress specifically mandates, exhaustion is required.") (citation omitted). And this Court has recognized that when a statute mandates exhaustion, "a court cannot excuse it." *Avocados Plus, Inc. v. Veneman*, 370 F.3d 1243, 1247 (D.C. Cir. 2004); *accord Spinelli v. Goss*, 446 F.3d 159, 162 (D.C. Cir. 2006). Under these cases, the Court may not read exceptions into § 405(a).[21]

Second, even if exceptions could be read into § 405(a), the Carrier Petitioners have not shown that they are entitled to one. They claim (at 23) to have been "unaware that a 2–2 vote had been taken" and say they "had no reason to inquire" whether a vote had occurred. Yet shortly after the FCC staff issued the news release, it was widely reported in the trade press that Chairman Martin had "circulated an order for a vote, but it failed 2–2." *See, e.g.*, Communications Daily Article, *supra*, note 10. Chairman Martin and Commissioner Tate likewise made clear in their joint statement that they had "proposed granting Verizon[] limited relief," but that "a majority of the Commission" could not "reach[] consensus on a proposal." Joint Statement at

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[21] Past decisions by this Court have found that § 405(a) incorporates a variety of common-law exhaustion exceptions, *WSB, Inc. v. FCC*, 85 F.3d 695, 698 n.7 (D.C. Cir. 1996); *Office of Communication of United Church of Christ v. FCC*, 779 F.2d 702, 706–707 (D.C. Cir. 1985); *Washington Ass'n for Television & Children v. FCC*, 712 F.2d 677, 681–682 & n.8 (D.C. Cir. 1983), but for reasons set out in the text, we submit that they have been overruled in this respect by the Supreme Court decisions that require construing statutory exhaustion provisions like § 405(a) according to their terms. In *Qwest Corp. v. FCC*, 482 F.3d 471, 476 (D.C. Cir. 2007), the Court noted, but found it unnecessary to resolve, the tension between this Court's traditional § 405 cases and recent Supreme Court and circuit precedent.

2 & n.10 (J.A. 34). The Carrier Petitioners thus had sufficient "reason to inquire" about the circumstances surrounding the deemed grant in a petition for agency reconsideration.[22] Their decision not to file a reconsideration petition precludes them from now contesting the effect of the Commission's divided vote in this Court.

B. The Carrier Petitioners assert (at 24) that the Commission has an obligation to "reasonably explain how the statutory forbearance standards were satisfied" even when a forbearance petition is deemed granted under § 10(c). That is so, they contend (at 28), because a "deemed grant" is subject to the same APA duty of reasoned decisionmaking as a "timely grant by affirmative Commission vote." The Carrier Petitioners, again, did not present their arguments to the Commission in a petition for reconsideration. As they acknowledge (at 22), "issues not presented to the Commission may not be raised for the first time before a reviewing court."

To be sure, the Carrier Petitioners could not have known that Verizon's petition would be deemed granted until after the statutory deadline had passed. But "even when a petitioner has no reason to raise an argument until the FCC issues an order that makes the issue relevant," the petitioner still must file a petition for reconsideration with the Commission "before it may seek judicial review." *In re Core Communications, Inc.*, 455 F.3d 267, 276–277

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[22] Elsewhere in their brief (at 28–29 n.8), the Carrier Petitioners suggest that they would have sought a writ of mandamus "[i]f the Commission had *not* acted on Verizon's Petition." The Carrier Petitioners, however, did not file a mandamus petition in the almost six months between the March 20, 2006, news release announcing the deemed grant and the September 12, 2006, congressional hearing in which the Carrier Petitioners assert (at 23) that they first learned of the Commission's vote. This failure undercuts their claim that, until September 12, they had no idea that there had been a vote; if they believed that no vote had taken place, they presumably would have sought mandamus to force one.

(D.C. Cir. 2006). Indeed, this Court has "been [a] 'stickler[]' in requiring § 405(a) exhaustion where a party 'complains of only a technical or procedural mistake, such as an obvious violation of a specific APA requirement.'" *Qwest Corp.*, 482 F.3d at 475 (quoting *Time Warner Entertainment Co. v. FCC*, 144 F.3d 75, 80–81 (D.C. Cir. 1998)). "[P]rocedural objections premised on the APA [are] precisely the sort appropriately raised before the Commission in the first instance." *City of Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1163 (D.C. Cir. 1987). The Carrier Petitioners' failure to satisfy their exhaustion obligation under § 405(a) after the agency issued the news release precludes them from now arguing that the deemed grant of Verizon's forbearance petition should be reversed because the Commission failed to justify it under the § 10(a) forbearance standards.

III. IF THE COURT REACHES THE MERITS, IT SHOULD REJECT PETITIONERS' APA CLAIMS

As noted above, the Carrier Petitioners raise two APA arguments in this case. First, they argue that "the Commission erroneously announced that [Verizon's] petition was deemed granted," rather than denied by the Commission's split vote on the draft MO&O. Carrier Pets. Br. 1. Second, they contend (at 24, 36–37) that, if Verizon's petition was deemed granted, the deemed grant should be reversed because the Commission did not justify the grant under the § 10(a) forbearance standards. If the Court concludes that the Commission has taken reviewable action and that the § 405(a) exhaustion bar does not apply, the Court should reject the Carrier Petitioners' APA claims.

A. The Commission Reasonably Concluded that Verizon's Forbearance Petition Had Been Deemed Granted

The news release and all of the commissioners' separate statements concluded that Verizon's forbearance petition had been deemed granted under

§ 10(c).[23] If the news release or separate statements are held to be reviewable FCC orders, then that conclusion should be affirmed. There is no disagreement that "[s]ection 10 is utterly silent on what it means to 'deny'" a forbearance petition for the purpose of forestalling a deemed grant. *See* Carrier Pets. Br. 19. In light of the statutory silence, the four commissioners' unanimous view that their 2–2 vote on the Bureau's draft order was *not* such a "denial" is reasonable and entitled to deference under *Chevron*'s second step. *Chevron*, 467 U.S. at 843 (when a "statute is silent or ambiguous, . . . the question for the court is whether the agency's answer is based on a permissible construction.").

1. The Carrier Petitioners argue (at 16) that, "[w]hen the FCC voted 2–2 on Verizon's [p]etition, the legal effect of its deadlock was to deny" the petition. This argument fails for two independent reasons. First, its factual premise is demonstrably false: the Commission never voted on "Verizon's [p]etition." More fundamentally, the Carrier Petitioners misapprehend the nature of administrative decisionmaking and the requirements of § 10.

As an initial matter, the Carrier Petitioners have their facts wrong. The Commission did not vote "on Verizon's [p]etition," so a deadlock could not have led to denial of that petition. Just as a court does not decide cases by voting to adopt or reject a particular brief, the Commission does not resolve proceedings by voting to adopt or reject particular comments or petitions. Rather, the Commission makes decisions by voting on draft "orders" that address the

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[23] Joint Statement at 2 (J.A. 34) (noting that "the effect given to the petition by operation of law grants Verizon further broadband relief"); Copps Statement at 1 (J.A. 35) (stating that "[i]t would have been far better to deny this petition" rather than "permit a forbearance petition to go into effect"); Adelstein Statement at 3 (J.A. 40) (stating that Verizon's petition was granted "by default").

issues presented in the proceeding. In this case, the Commission voted on adoption of a proposed MO&O that would have granted Verizon's petition in part and denied it in part. As the voting record shows, Chairman Martin and Commissioner Tate voted to "approve" adoption of the draft order and Commissioners Copps and Adelstein dissented, producing a 2–2 split. *See* FOIA Letter, Attachment. As a result, no Commission order was adopted, and Verizon's petition was neither granted nor denied, but "deemed granted" under § 10(c).[24]

Putting aside this factual defect in the Carrier Petitioners' argument, it would still fail as a matter of law. Under traditional principles of agency decisionmaking, the Commission could not have denied Verizon's forbearance petition with a 2–2 vote. Absent an *ex ante* delegation of authority, *see* 47 U.S.C. § 155(c)(1), the Commission takes action only upon a majority vote of participating commissioners.[25] With four commissioners voting, an order denying Verizon's forbearance petition would have required the concurrence of

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[24] *See North Lawndale Economic Development Corp. v. Board of Governors of the Fed. Reserve Sys.*, 553 F.2d 23, 26 (7th Cir. 1977) ("We agree with petitioner that its applications must be deemed to have been granted because the Board did not act on them within ninety-one days after the complete record was submitted"); *Tri-State Bancorporation, Inc. v. Board of Governors of the Fed. Reserve Sys.*, 524 F.2d 562, 568 (7th Cir. 1975) (deeming application "granted as a matter of law" because of Board inaction within requisite time period).

[25] *See FTC v. Flotill Prods., Inc.*, 389 U.S. 179, 185–186 n.9 (1967) (noting that the FCC and other agencies "*act* on the *majority* vote of a quorum") (emphases added); *WIBC, Inc.*, 259 F.2d at 943 (the FCC "may act . . . only on the vote of a majority of those present"); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 861 (D.C. Cir. 1970) ("the Commission may act . . . by a vote of a majority of those present"), *cert. denied*, 403 U.S. 923 (1971); *see also NYPSC*, 543 F.2d at 776 (stating that it is the agency's "institutional decision[]," which "mean[s], of course, a decision by a majority vote duly taken," that "bear[s] legal significance").

at least three commissioners. Verizon's petition was deemed granted under § 10(c) because no such order received the requisite assent in this case.[26]

The Carrier Petitioners respond that the principle of *semper praesumitur pro negante*—the "presumption always is in favor of the one who denies," Black's Law Dictionary 1361 (6th ed. 1990)—compels a different result. Not so. As the authorities cited by the Carrier Petitioners reveal, the *semper praesumitur* principle applies only to legislatures, where a tie vote can prevent a measure from passing, and appellate courts, where a tie vote results in affirmance of a lower court judgment. In neither case is any precedent set or any explanation required. But in the administrative setting, a tie vote typically does not result in the "denial" of a petition because an agency's decision to deny is "action" that must be justified without regard to the *semper praesumitur* principle.[27] Accordingly, for regulatory commissions, the rule is that "legal action can be taken by a majority and by none less." *WIBC, Inc.*, 259 F.2d at 943 (internal quotation marks omitted).

Section 10(c) embodies that traditional rule by putting the onus on the FCC to act in its institutional capacity, *i.e.*, with majority support, in order to avoid a deemed grant. The statute thus imposes a time limit on the "*Commission*"—not individual commissioners—to deny a forbearance petition,

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[26] The Carrier Petitioners assert (at 21) that the FCC's briefs in *Core Communications* and *Qwest Corporation* "conceded that a vote on a forbearance petition" constituted action on the petition. But in those cases the Commission did not just vote, but achieved a majority supporting the adoption of final orders. *See Core Communications*, 455 F.3d at 274–275; *Qwest Corp.*, 482 F.3d at 473–474. The Commission's 2–2 vote in this case did not produce the same result.

[27] *SUWA*, 542 U.S. at 63; *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 142 (1939) ("An order of the Commission dismissing a complaint on the merits and maintaining the *status quo* is an exercise of administrative function, no more and no less, than an order directing some change in status.").

and it requires that the Commission's denial be "for failure to meet the requirements for forbearance" under § 10(a)—not simply for failure to reach agreement on adoption of a proposed order. Section 10(c) further requires the "*Commission*" to explain "its" decision to deny "in writing"; an explanation given by only two commissioners would not satisfy this requirement because it would "possess[] no authoritative significance." *NYPSC*, 543 F.2d at 776 (quoting *Braniff Airways, Inc. v. Civil Aeronautics Bd.*, 379 F.2d 453, 465 (D.C. Cir. 1967)); *see also New York Dock Ry.*, 696 F.2d at 34 (tie-vote by ICC did not "approve or disapprove" tariff, but resulted in "no final decision"). In short, § 10(c) recognizes that the Commission is "an entity apart from its members," *NYPSC*, 543 F.2d at 776, and that only by acting as an institution does the Commission have the power to deny a forbearance petition and forestall a deemed grant.[28]

2. The Carrier Petitioners rely heavily (at 17–18) on this Court's unpublished mandamus order in *In re Radio-Television News Directors Association*, No. 97–1528, 1998 WL 388796 (D.C. Cir. May 22, 1998) (*RTNDA*), to support their view that the Commission's 2–2 vote denied Verizon's forbearance petition. As an unpublished decision, *RTNDA* is not controlling precedent. *See* D.C. Cir. R. 32.1(b)(1)(A) (unpublished opinions issued before

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[28] Contrary to the Carrier Petitioners' assertion (at 20–21), nothing in the Communications Act or the FCC's rules supports treating a 2–2 vote as a denial. Section 155(c)(5) of the Act, 47 U.S.C. § 155(c)(5), provides the Commission the discretion to "grant, in whole or in part, or deny" an application seeking review of a decision of a subordinate official. 47 C.F.R. § 1.407 states that the Commission will grant a petition to initate a rulemaking proceeding if it finds "sufficient reasons" for doing so and, if not, will deny the petition. 47 C.F.R. § 2.919 likewise states that the Commission will deny an application for equipment authorization if the application does not meet the FCC's standards. None of these provisions alters the rule that the Commission's decision, whether to grant or deny, must be made by majority vote.

2002 "are not to be cited as precedent"); *United States v. Singleton*, 182 F.3d 7, 12–13 & n.7 (D.C. Cir. 1999).[29] In any event, *RTNDA* provides no support for the Carrier Petitioners' argument.

The Court issued the *RTNDA* order in response to an extraordinary set of circumstances. In that case, different groups of commissioners had twice deadlocked on the issue of whether to repeal or modify the Commission's personal-attack and political-editorial rules. The agency had proposed doing so fifteen years earlier, and the petitioners in *RTNDA* had requested that step over a decade before in a "Petition for Expedited Rulemaking." In response to the second of two mandamus petitions, the Court in *RTNDA* directed the Commission to "submit the final results of a formal vote on the Petition for Expedited Rulemaking" within 30 days and to "include a statement of reasons from any Commissioner voting against repeal or modification of the Commission's rules."[30]

The Carrier Petitioners rely on *RTNDA* because the Court there indicated that a deadlocked vote could result in a (reviewable) denial of the petition,[31]

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[29] The Carrier Petitioners assert that the Court "subsequently reaffirmed its decision" in *RTNDA* "in a published opinion." *See* Carrier Pets. Br. 18 (citing *Radio-Television News Directors Ass'n v. FCC*, 184 F.3d 872 (D.C. Cir. 1999) (*RTNDA II*)). That is incorrect. The Court's published opinion in *RTNDA II* made clear that it was not revisting *RTNDA* because that decision was "law of the case." *Id.* at 880 n.6. *RTNDA II* did not address the merits of the unpublished order.

[30] 1998 WL 388796, at *1. In accordance with the Court's order, the Commission voted on the Petition for Expedited Rulemaking on June 18, 1998. Four days later, the two commissioners who had voted against repeal or modification of the personal-attack and political-editorial rules released a joint statement explaining the reasons for their votes. *See Commission Proceeding Regarding the Personal Attack and Political Editorial Rules*, 13 FCC Rcd 21901 (1998), *remanded*, *RTNDA II*, 184 F.3d 872.

[31] *RTNDA*, 1998 WL 388796, at *1 (citing *Democratic Congressional Campaign Comm. v. FEC*, 831 F.2d 1131, 1134–35 (D.C. Cir. 1987) (*DCCC*)).

but they ignore the context in which that statement was made. The *RTNDA* order invoked as support for that statement this Court's decision in *DCCC*, which had held that a party could seek judicial review when the Federal Election Commission (FEC) dismissed a complaint "due to a deadlock." 831 F.2d at 1133. Unlike the FCC, the FEC automatically dismisses complaints that do not have the support of a majority of its six commissioners,[32] a practice that makes sense for that agency because its "failure to act" is as amenable to judicial review as its orders. *See* 2 U.S.C. § 437g(a)(8)(A), (C). The Court in *RTNDA* appears to have understood that the FCC did not have a similar practice—that is why the Petition for Expedited Rulemaking had remained pending despite two different 2–2 votes by the Commission—and thus looked to FEC practice for the purpose of fashioning an appropriate mandamus remedy to address the unusual circumstances of that case, taking care to note that "the FCC, through counsel, stated in open court that it has no objection to the entry of this order." 1998 WL 388796, at *1. *RTNDA* did not extend the FEC's unique practice for dealing with deadlocked votes to other FCC proceedings or otherwise alter the traditional rule that the FCC acts only by majority vote.[33]

Moreover, unlike in *RTNDA*, the Court here is not faced with the need to fashion a creative mandamus remedy in order to bring resolution to an intractable agency proceeding. Congress has already contemplated what should happen if the Commission fails to act on a forbearance petition in a

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[32] *See DCCC*, 831 F.3d at 1133 ("Because DCCC's complaint thus failed to attract the requisite four affirmative votes, the FEC dismissed it.") (internal cross-reference omitted); *see also* 11 C.F.R. §§ 111.9(b), 111.17(b).

[33] In all events, to the extent that *RTNDA* holds that an agency's failure to act on a request can be treated as a reviewable disposition of that request, it is inconsistent with the Supreme Court's later decision in *United States v. Bean*. *See supra* at 19–20 (discussing *Bean*).

timely manner, and it decided to create a deregulatory default that presumes that grant of forbearance relief, rather than a denial, is the more appropriate course. *See* 47 U.S.C. § 160(c). Thus, whatever weight the Court's unpublished decision in *RTNDA* might have in another context, it does not render unreasonable the commissioners' conclusion that their 2–2 vote in this case did not "deny" Verizon's forbearance petition under § 10(c)—and that Verizon's petition was instead deemed granted by operation of law.[34]

B. Section 10(c) Does Not Limit Deemed Grants to Petitions that the Commission Concludes Satisfy the § 10(a) Forbearance Standards

The Carrier Petitioners argue (at 24) that, if Verizon's forbearance petition was deemed granted under § 10(c), the Court should reverse the deemed grant because "the Commission failed to reasonably explain how the statutory forbearance standards were satisfied." This argument rests on the notion that only petitions that the Commission concludes satisfy the § 10(a) forbearance criteria may be deemed granted under § 10(c). There is no textual basis in § 10 for that position.

The first sentence of § 10(c) states that "[a]ny telecommunications carrier . . . may submit a petition . . . requesting that the Commission exercise" its forbearance authority under § 10(a) "with respect to . . . service[s] offered by" that carrier. The second sentence then provides that "*[a]ny such petition* shall be deemed granted" if it is not timely denied. 47

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[34] In a footnote, the Carrier Petitioners assert (at 18 n.4) that the Commission's 2–2 vote in this case can be analogized to the court-ordered vote in *RTNDA* because "the deadlocked vote on Verizon's [p]etition cannot be broken at the FCC" after the § 10(c) deadline has passed. But that is only because § 10(c) has already "broken" the deadlock in favor of a deemed grant. In any event, the Commission now has a fifth commissioner, so it is not clear why the Carrier Petitioners view the deadlock as unbreakable.

U.S.C. § 160(c) (emphasis added). The second sentence thus makes clear that *any* petition filed by a telecommunications carrier under the first sentence may be deemed granted. Had Congress intended to make deemed grants subject to the § 10(a) criteria, it could have easily used language to that effect.[35] Congress, however, included "no such qualifying language" in § 10(c). *AT&T Corp.*, 369 F.3d at 561 (comparing § 271(f)(1)'s automatic sunset provision with 47 U.S.C. §§ 273(d)(6) and 549(e), which require FCC findings before a sunset can take effect).

Nor should the Court adopt the Carrier Petitioners' countertextual interpretation of § 10(c) based on their unfounded fear (at 28) that the Commission will otherwise seek to "insulate *all* of its forbearance grants from judicial review *via inaction*." The Chairman and the commissioners are entitled to a "presumption . . . that they will act properly and according to law," *FCC v. Schreiber*, 381 U.S. 279, 296 (1965), and that presumption has been borne out with respect to the Commission's actions under § 10. As this Court's cases testify, the Commission has repeatedly resolved forbearance petitions under the § 10(a) criteria,[36] notwithstanding the availability in each case of the deemed grant "option," and, indeed, the agency has continued to issue orders affirmatively granting forbearance petitions under § 10(a) even

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[35] *See, e.g.*, 25 U.S.C. § 2710(d)(8)(C) (providing that a tribal-state compact not timely approved or disapproved by the Secretary of the Interior "shall be considered to have been approved by the Secretary, *but only to the extent the compact is consistent with the provisions of this chapter*") (emphasis added).

[36] *See, e.g.*, *Qwest Corp.*, 482 F.3d at 472–473; *EarthLink, Inc. v. FCC*, 462 F.3d 1 (D.C. Cir. 2006); *Core Communications*, 455 F.3d 267.

after the deemed grant in this case.[37] The Commission has a natural incentive to make its decisions through written orders that provide guidance to regulated entities and future commissions. And even if there were a basis for the Carrier Petitioners' apprehensions, the proper recourse for them would be to ask Congress "to correct whatever defects experience may reveal," *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 146 (1940), not to ask this Court to rewrite § 10. Accordingly, if the Court reaches the merits, it should reject the Carrier Petitioners' APA challenge to the deemed grant in this case.

IV. PETITIONERS' CONSTITUTIONAL ARGUMENTS ARE INSUBSTANTIAL

The Carrier Petitioners argue (at 33–36) that the canon of constitutional avoidance requires the Court to read § 10 as providing for judicial review of a deemed grant. The NJDRC goes further, arguing that the Court should declare § 10 unconstitutional in its entirety. Neither argument has merit.

A. The Canon of Constitutional Avoidance Does Not Apply to § 10(c)

The canon of constitutional avoidance is a "tool for choosing between competing plausible interpretations of a statutory text." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). To invoke the canon, the petitioner must show that (1) the statute at issue is "genuinely susceptible to two constructions *after*, and not before, its complexities are unraveled" and (2) one of those constructions creates "a *serious likelihood* that the statute will be held unconstitutional."

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[37] *See, e.g., Petition of Qwest Communications International Inc. for Forbearance from Enforcement of the Commission's Dominant Carrier Rules As They Apply After Section 272 Sunsets*, 22 FCC Rcd 5207 (2007); *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, 22 FCC Rcd 1958 (2006), pets. for review pending, *Covad Communications Group, Inc. v. FCC*, Nos. 07–70898 *et al.* (9th Cir.).

Almendarez-Torres v. United States, 523 U.S. 224, 238 (1998) (emphases added). Neither of these requirements has been met.

1. Contrary to the Carrier Petitioners' suggestion (at 33), § 10 is not genuinely susceptible to a construction that permits judicial review of a deemed grant. As the Carrier Petitioners acknowledge (at 2), the Court's authority to engage in judicial review is defined by the Hobbs Act and the APA. For the reasons given above, *supra* Section I, judicial review is unavailable under those statutes because a deemed grant is neither an "order" nor "agency action." Nothing in § 10 creates an independent jurisdictional basis for obtaining judicial review of a deemed grant.[38]

The Carrier Petitioners respond (at 28–29) that the term "deemed grant" can be interpreted to mean the equivalent of a Commission order granting a forbearance petition under § 10(a) for "all substantive purposes, including judicial review." This is a wholly implausible construction, and one that is "plainly contrary to the intent of Congress." *Miller v. French*, 530 U.S. 327, 341 (2000) (internal quotation marks omitted). When the Commission grants a forbearance petition by order, it has an obligation to explain its exercise of authority under § 10(a), and its failure to do so would be automatically reversible under the APA. In contrast, a deemed grant necessarily takes place

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[38] In other contexts, Congress has made plain its intent to treat an agency's failure to act as if it were reviewable agency action. *See, e.g.*, 30 U.S.C. § 1724(h)(2)(B) (in the absence of a timely decision, the agency "shall be deemed to have issued a final decision" and "the appellant shall have a right to judicial review of such deemed final decision in accordance with Title 5"); 15 U.S.C. § 3416(a)(2) ("if [the agency] fails to act within 30 days after the filing of such application, such failure to act shall be deemed final agency action with respect to such application"); *see also* 47 U.S.C. § 332(c)(7)(B)(v) ("Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction.").

in the absence of a timely Commission decision. Therefore, if the Court treated a deemed grant as an FCC order, it would have to reverse in every case for lack of a reasoned explanation, even though Congress has provided that, in that situation, a forbearance petition "*shall* be deemed granted." 47 U.S.C. § 160(c) (emphasis added). A court "cannot press statutory construction to the point of disingenuous evasion even to avoid a constitutional question." *Miller*, 530 U.S. at 341 (internal quotation marks omitted). The Carrier Petitioners' proposed reading of § 10 would do just that.

For similar reasons, the Carrier Petitioners' reliance (at 29–30) on the APA's "presumption of reviewability" is misplaced. As an initial matter, the presumption applies to "agency action," not agency inaction. *Cf. Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (when an agency "[r]efus[es] to take enforcement steps," "the presumption is that judicial review is not available"). Moreover, the presumption in favor of review "may be overcome by inferences of intent drawn from the statutory scheme as a whole." *Block v. Community Nutrition Inst.*, 467 U.S. 340, 349 (1984). For the reasons set out above, judicial review of a deemed grant would conflict with § 10(c)'s directive that a forbearance petition "shall be deemed granted" if the FCC fails to make a timely decision. This is sufficient basis for overcoming any presumption of reviewability that might otherwise apply.

Perhaps recognizing the anomalies that their reading of § 10(c) would create, the Carrier Petitioners suggest two avenues by which a deemed grant, in theory, could be reviewed. First, they argue that the Court can review "the rationale of the 'controlling group'" as if it were the agency's decision. Carrier Pets. Br. 36 (quoting *FEC v. National Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) (*NRSC*)); *see also* NJDRC Br. 11–12. The Court developed the controlling-group concept to address deadlocks by the FEC,

which has an even number of members and whose judicial-review statute expressly provides for merits review of its "failure to act." In that context, the Court requires the commissioners whose votes produced the result *for which they had voted* to explain "their reasons for so voting" in order to "make judicial review a meaningful exercise." *NRSC*, 966 F.2d at 1476. But that principle has no application in a case brought under the Hobbs Act, which is predicated on the existence of an FCC "order" that has been adopted by a majority of FCC commissioners.

Furthermore, even if the controlling-group concept could be extended to FCC proceedings generally, it cannot be applied to this case because there is no identifiable group of commissioners whose votes "controlled" whether Verizon's forbearance petition would be deemed granted. Chairman Martin and Commissioner Tate voted for a draft order that would have granted Verizon's petition in part and denied it in part. Had their votes prevailed, the draft order would have been adopted, and Verizon's petition would not have been *deemed* granted under § 10(c). Commissioners Copps and Adelstein voted against adoption of the draft order, but no one suggests that having these two commissioners justify their votes against the draft order would "make judicial review a meaningful exercise" in this case. *NRSC*, 966 F.2d at 1476. Simply put, because *none* of the commissioners voted for Verizon's petition to be deemed granted by operation of law, none of them can comprise a "controlling group" whose views the Court can regard as those of the agency for purposes of judicial review.

Second, the Carrier Petitioners suggest that this Court can independently review a forbearance petition that has been deemed granted to determine whether it meets "the minimum requirements for forbearance" under § 10(a). Carrier Pets. Br. 37–46; *see also* NJDRC Br. 12–13. Under the

Communications Act, however, a reviewing court's role is "restricted to a purely judicial review" function. *Pottsville Broad. Co.*, 309 U.S. at 144. That function necessarily "contemplates review of some action by another entity, rather than initial judgment of the court itself." *Bean*, 537 U.S. at 77.[39]

Moreover, the Carrier Petitioners' request that the Court independently evaluate Verizon's forbearance petition is inconsistent with the settled law that an "appellate court [cannot] intrude upon the domain which Congress has exclusively entrusted to an administrative agency." *INS v. Orlando Ventura*, 537 U.S. 12, 16 (2002) (quoting *SEC v. Chenery*, 318 U.S. 80, 88 (1943)). The questions that the § 10(a) criteria ask—whether regulation is necessary to ensure "just" and "reasonable" rates, to protect consumers, and to promote the "public interest," *see* 47 U.S.C. § 160(a)(1), (2), (3)—contemplate a weighing of policy considerations that are uniquely within the agency's understanding.[40] The "public interest" standard in particular "calls for an inherently policy-based decision best left in the hands of an agency." *Bean*, 537 U.S. at 77; *see also Pottsville Broad. Co.*, 309 U.S. at 145–146 (rejecting argument that would make the "contingencies of judicial review and of litigation, rather than the

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[39] *See also id.* at 77–78 ("the very use . . . of the word 'review' to describe a district court's responsibility . . . signifies that a district court cannot grant relief on its own"); *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) ("The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.").

[40] *See, e.g.*, *Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981) ("No court may substitute its own judgment on reasonableness [of rates] for the judgment of the [Federal Energy Regulatory] Commission"); *Capital Network Sys., Inc. v. FCC*, 28 F.3d 201, 204 (D.C. Cir. 1994) ("Because 'just,' 'unjust,' 'reasonable,' and 'unreasonable' are ambiguous statutory terms, this court owes substantial deference to the interpretation the Commission accords them."); *Cellular Telecomms. & Internet Ass'n v. FCC*, 330 F.3d 502, 512–513 (D.C. Cir. 2003) (deferring to the Commission's interpretation of consumer protection under § 10(a)(2)).

public interest, . . . decisive factors" in evaluating broadcast-station applications). There is no reasonable construction of § 10 that would permit a reviewing court to make these policymaking judgments in the agency's stead.

2. The canon of constitutional avoidance is also inapplicable because there is no serious constitutional question for the Court to avoid. Congress frequently uses automatic-grant provisions to encourage timely agency action and to provide relief to parties that may be affected by an agency's failure to act.[41] Congress's decision to take those same considerations into account in § 10 therefore breaks no new ground.[42] Moreover, the constitutional-avoidance

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[41] *See, e.g.*, 12 U.S.C. § 1842(b)(1) (application to become a bank holding company deemed granted if not acted upon within 91 days); 19 U.S.C. § 4033(o)(4)(D) (request to alter import schedule automatically approved if the President does not "make a determination" on the request within 45 or 60 days); 21 U.S.C. § 360aaa–3(d)(3)(A) (application to disseminate information about new uses for a drug or device deemed approved if not approved or denied within 60 days); 33 U.S.C. § 1329(d)(1) (state water-pollution management program deemed approved if not disapproved within 180 days); 33 U.S.C. § 1344(h)(3) (application by states for authority to issue certain discharge permits deemed approved if the agency "fails to make a determination" within 120 days); 45 U.S.C. § 744(a)(2)(C) (authorizing deemed grant of applications to discontinue certain rail services if the agency does not make a final determination within 120 days); 47 U.S.C. § 252(e)(4) (interconnection agreements deemed approved if the state commission does not approve or reject them in a timely manner); 47 U.S.C. § 537 (sale of cable franchises deemed approved if local franchising authorities do not render a final decision within 120 days); 49 U.S.C. § 41714(i)(4) (request for exemption from airport-slot regulation deemed approved if neither approved nor denied within 60 days); 49 U.S.C. § 47504(b)(2) (airport noise-abatement program deemed approved if not acted upon within 180 days).

[42] *See* 142 Cong. Rec. S700 (remarks of Sen. Burns) (noting that the 1996 Act encourages "speedy action on . . . petitions for forbearance"); 141 Cong. Rec. S7898 (June 7, 1995) (remarks of Sen. Dole) (introducing amendment adding the Senate predecessor to § 10(c) in order to create a "petition driven process" that would force the Commission "to eliminate outdated regulations, and to do so in a timely manner"); 141 Cong. Rec. S8070 (remarks of Sen. Pressler) (stating that the Dole Amendment would "improve the [statute's] deregulatory nature").

canon "does not apply mechanically whenever there arises a significant constitutional question the answer to which is not obvious," but only if there is "a serious likelihood that the statute will be held unconstitutional." *Almendarez-Torres*, 523 U.S. at 239. The Carrier Petitioners' contention that § 10(c) raises serious nondelegation and Presentment Clause concerns does not come close to satisfying that standard.

a. Nondelegation. Article I, § 1 of the U.S. Constitution vests "[a]ll legislative [p]owers . . . in a Congress of the United States." This provision not only authorizes Congress to enact federal statutes, but also prohibits Congress from delegating that power to "another branch or entity." *Loving v. United States*, 517 U.S. 748, 758 (1996). Therefore, when Congress "confers decisionmaking authority upon agencies, [it] must 'lay down by legislative act an intelligible principle to which the person or body authorized to act is directed to conform.'" *Whitman v. American Trucking Assn's, Inc.*, 531 U.S. 457, 472 (2001) (emphasis and brackets removed) (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928)). The intelligible principle acts as a guide to agency decisionmaking, so that when an agency exercises its congressionally delegated powers, it is acting to implement Congress's statute rather than creating new law. *See Loving*, 517 U.S. at 771; *see also INS v. Chadha*, 462 U.S. 919, 953–954 n.16 (1983).

Section 10(a) confers decisionmaking authority on the Commission, but as the Carrier Petitioners recognize (at 33), section 10(a) also provides "an 'intelligible principle' in the form of the three-part" forbearance test. The factors set forth in section 10(a) (and (b))—ensuring just and reasonable rates, protecting consumers, and promoting the public interest, including a consideration of whether forbearance will "enhance competition" and "promote competitive market conditions"—provide as intelligible a principle as many

others that the Supreme Court has upheld against nondelegation challenges. *See, e.g., American Trucking Ass'ns, Inc.*, 531 U.S. at 474.

Moreover, the Carrier Petitioners correctly do not argue that the intelligible-principle test applies to the deemed grant of a forbearance petition under § 10(c). Congress often enacts statutes whose provisions automatically take effect upon the actions (or, here, inaction) of others,[43] and it has never been thought that Congress delegates its legislative power whenever it specifies that legal consequences will flow "upon the occurrence of a particular event."[44] In § 10(c), "*Congress* made the decision" that forbearance petitions not timely denied should be deemed granted "*by operation of law*." *AT&T Corp.*, 369 F.3d at 560 (first emphasis added). Because "Congress did not 'delegate' this decision to the Commission," the decision is not subject to the intelligible-principle requirement. *Id.*

Nonetheless, the Carrier Petitioners argue (at 33–34) that § 10(c) presents "serious constitutional questions under the nondelegation doctrine" because, they speculate, the § 10(a) criteria would become "ineffective and therefore constitutionally inadequate" if they did not also apply to deemed grants. There is no basis for their concern. The purpose of the intelligible-principle requirement is not to force an agency to act. Its sole purpose is to ensure that, when an agency does act, its *exercise of delegated authority* is administrative,

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[43] *See, e.g., Currin v. Wallace*, 306 U.S. 1, 15–16 (1939) (holding that regulation conditioned on approval by industry referendum is not a delegation of legislative power to industry groups); *Field v. Clark*, 143 U.S. 649, 692–693 (1892) (upholding statute that imposed reciprocal import duties based on whether other countries have levied duties on U.S. exports).

[44] *Clinton v. City of New York*, 524 U.S. 417, 446 (1998); *accord The Brig Aurora*, 7 Cranch (11 U.S.) 382, 388 (1813) (Congress may specify that an expired statute be revived "upon the occurrence of any subsequent combination of events").

not legislative, in character. *See, e.g.*, *Chadha*, 462 U.S. at 953–954 n.16. There is no need for the forbearance criteria to apply to deemed grants because a deemed grant occurs only when the Commission has *not* exercised its decisionmaking authority under § 10. Nor does that make the forbearance criteria ineffective. The § 10(a) criteria continue to perform their constitutional role of guiding the Commission's decisionmaking when the agency does act, thus ensuring that the Commission's forbearance decisions retain their administrative character.

Even if *arguendo* a deemed grant were the product of agency—as opposed to congressional—decisionmaking, it would not present a nondelegation problem. In fact, it is the presence of standards in § 10(a), rather than the absence of them in § 10(c), that is atypical. Forbearance does not rescind the relevant portions of the Act and FCC regulations; instead, the agency "*forbear[s]*" from "*applying*" or "*enforc[ing]*" them. 47 U.S.C. § 160(a) (emphases added). An agency's exercise of enforcement authority—including a decision against enforcement—is not a legislative function but, rather, part of the Executive Branch's responsibility to "take care that the Laws be faithfully executed." *Chaney*, 470 U.S. at 832 (quoting U.S. Const. art. II, § 3). Accordingly, in this context the normal presumption in favor of judicial review of agency actions is reversed: There is a presumption that "judicial review is *not* available" for an agency's enforcement decisions. *Id.* at 831 (emphasis added). That presumption may be rebutted when Congress specifies standards to guide an agency's enforcement discretion, as in § 10(a). But Congress is certainly not required to do so and can instead choose to leave the default rule of non-reviewability in place, as it did in § 10(c).

b. Presentment Clause. As relevant here, the Presentment Clause provides that federal statutes must be enacted by both Houses of Congress and

presented to the President for his approval or veto. U.S. Const. art. I, § 7, cl. 2. There is no dispute that the 1996 Act, which added § 10 to the Communications Act, satisfied the requirements of the Presentment Clause. Nonetheless, the Carrier Petitioners assert (at 35) that, absent judicial review of a deemed grant, § 10 might suffer from the same "fate" as the "line item veto," which, in *City of New York*, was held to violate the Presentment Clause because it allowed the President to "cancel" certain spending items and tax benefits enacted by Congress. 524 U.S. at 438.

The Carrier Petitioners never explain why they believe § 10(c) is analogous to the line-item veto or otherwise raises a "serious likelihood that the statute will be held unconstitutional" under the Presentment Clause. *Almendarez-Torres*, 523 U.S. at 238. It may be that the Carrier Petitioners agree with the NJDRC (at 17) that a grant of forbearance "suspends, modifies, changes, and repeals the [Communications Act] or portion thereof, effectively eliminating and repealing it." Even if that were so, it would not raise any Presentment Clause concerns, because "Congress itself [would have] made the decision to repeal prior rules upon the occurrence of a particular event"—here, the Commission's failure to deny a forbearance petition by the statutory deadline. *City of New York*, 524 U.S. at 446 n.40. But it is not so. The effect of a grant of forbearance is to prevent the Commission from "apply[ing]" or "enforc[ing]" a provision of the Communications Act (or the FCC's regulations). 47 U.S.C. § 160(a). Forbearance does not remove the Act from the books;[45] thus, the Act's requirements continue to apply to carriers not covered by the

[45] *See Terran v. Secretary of Health & Human Servs.*, 195 F.3d 1302, 1312 (Fed. Cir. 1999) (finding no Presentment Clause violation because, among other things, when the Secretary acts, "she does not change in any way the original" statute, but "rather promulgates an entirely new" set of regulations that "applies only prospectively.").

forbearance grant. Moreover, unlike the spending items and tax benefits "cancelled" by the line-item veto, *City of New York*, 524 U.S. at 436–437, no new legislation is needed to rescind a grant of forbearance relief. The Commission retains authority to revisit a decision granting forbearance under § 10(a).[46] A deemed grant under § 10(c) is no more immune from the Commission's ongoing regulatory jurisdiction.

B. The NJDRC's Constitutional Attack on § 10 Has No Merit

The NJDRC challenges § 10 in its entirety as a violation of separation of powers, equal-protection principles, and the Tenth and Eleventh Amendments. Because there was no "order" or agency "action" in this case, the court has no jurisdiction to decide these questions. *See supra* Section I. In any event, the contentions are meritless.[47] The NJDRC's separation-of-powers argument appears to be based on its view that a grant of forbearance "suspends, modifies, changes, and repeals" the Communications Act. *See* NJDRC Br. 17. This argument fails for the reasons stated above in response to the Carrier Petitioners' Presentment Clause argument. The NJDRC's other constitutional challenges are frivolous, for the reasons stated below.

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[46] *See, e.g., Earthlink, Inc.*, 462 F.3d at 12 ("Moreover, [the] FCC is fully capable of reassessing the situation if its predictions are not borne out."); *see also Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, 20 FCC Rcd 19415, 19456 n.204 (2005) ("To the extent our predictive judgment proves incorrect, carriers can file appropriate petitions with the Commission and the Commission has the option of reconsidering this forbearance ruling."), *aff'd*, *Qwest Corp.*, 482 F.3d 471.

[47] It is unclear whether the NJDRC challenges § 10 as applied or on its face. To the extent it is asserting a facial challenge, it must (but cannot) demonstrate that "no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

1. The NJDRC argues (at 18) that § 10 violates the equal-protection component of the Fifth Amendment because "telecommunications carriers, as opposed to any person, are the only ones who can file" forbearance petitions under § 10(c). Generally, economic legislation, such as § 10, that does not involve a suspect classification or a fundamental right will be upheld if there are "plausible reasons for Congress's action." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313–314 (1993) (internal quotation marks omitted). The NJDRC argues (at 18) that a higher standard of scrutiny applies because § 10(c) "enables telecommunications carriers to eliminate the rights of states to regulate intrastate services," a "fundamental right[]" in the NJDRC's view. The NJDRC cites no authority declaring the states' regulatory authority to be a "fundamental right" under equal-protection analysis, but even if such a fundamental right did exist, it would not be implicated here. Congress limited the Commission's forbearance authority, and by extension the outer scope of a deemed grant, to the Communications Act and the FCC's regulations. States have no "fundamental right" to enforce federal law.

Under rational-basis review, the question for the Court in an equal-protection challenge is whether "there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Beach Communications, Inc.*, 508 U.S. at 313. That highly deferential standard is easily met here. Congress enacted § 10 to provide the Commission with the ability "to reduce the regulatory burdens on the telephone company when competition develops." S. Rep. No. 104–23 (1995), at 5. It was wholly rational for Congress to conclude that the deregulatory objectives of § 10 would be advanced if regulated "telephone compan[ies]," *i.e.*, telecommunications carriers, could petition the FCC "to eliminate outdated regulations, and to do so in a timely manner." 141 Cong. Rec. S7898 (June 7, 1995) (remarks of Sen.

Dole). Congress also could rationally conclude that allowing (typically unregulated) non-carriers to petition for forbearance would unduly increase the burden on the Commission, particularly in light of the need to act before the deemed-granted deadline, without offering a commensurate benefit to Congress's deregulatory objective. The NJDRC's equal-protection claim is therefore without merit.

2. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People." The NJDRC argues (at 20) that the Tenth Amendment "precludes the FCC from using Section 10 to oust state commission jurisdiction" over "intrastate services under [47 U.S.C. § 271]" or "the setting of intrastate rates" under 47 U.S.C. § 251. The Tenth Amendment, however, speaks of "powers not delegated to the United States by the Constitution," and it is undisputed that Congress has the authority to regulate telecommunications carriers under the Commerce Clause. *See* U.S. Const. art. I, § 8; *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559, 1573 (2007). Moreover, as indicated above, the NJDRC has not cited any authority holding that a state has a right under the Tenth Amendment to enforce federal law. And nothing in § 10 prohibits a state commission from regulating intrastate carriers under *state* law, provided that such regulation does not conflict with federal policy. *See, e.g.*, *United States v. Locke*, 529 U.S. 89, 109–110 (2000). For these reasons, the NJDRC's Tenth Amendment claim should be rejected.

3. The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The NJDRC

argues (at 23) that, because "nothing in Section 10 or any other provision of the Act expressly says that the sovereign immunity of states is eliminated, curtailed or otherwise limited in any way," "state commissions could still exercise jurisdiction and apply the Act to the extent intrastate services were involved," even though § 10(e) prohibits state commissions from applying "any provision of the Act that the Commission has determined to forbear from" under § 10(a). *See* 47 U.S.C. § 160(e). Because the Commission has not attempted to enforce § 10(e) against New Jersey or any other state, the NJDRC's Eleventh Amendment claim is not ripe for review. *See Covad Communications Co. v. FCC*, 450 F.3d 528, 550–551 (D.C. Cir. 2006). In any event, the scope of the states' Eleventh Amendment immunity to suit has no bearing on the constitutionality of § 10: A grant of forbearance would be constitutional even if the NJDRC is correct that it could not fully be enforced against the states. The NJDRC's Eleventh Amendment claim therefore should be rejected.

CONCLUSION

The petitions for review should be dismissed for lack of jurisdiction. Alternatively, the petitions for review should be denied.

Respectfully submitted,

Samuel L. Feder /ns

SAMUEL L. FEDER
GENERAL COUNSEL

Joseph R. Palmore /ns

JOSEPH R. PALMORE
DEPUTY GENERAL COUNSEL

Jacob M. Lewis /ns

JACOB M. LEWIS
ASSOCIATE GENERAL COUNSEL

John E. Ingle /ns

JOHN E. INGLE
DEPUTY ASSOCIATE
GENERAL COUNSEL

Nandan M. Joshi

NANDAN M. JOSHI
COUNSEL

FEDERAL COMMUNICATIONS
COMMISSION
WASHINGTON, D.C. 20554
(202) 418–1740 (TELEPHONE)
(202) 418–2819 (FAX)

July 5, 2007

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SPRINT NEXTEL CORPORATION, ET AL. PETITIONERS V. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA RESPONDENTS	)	Nos. 06–1111 (AND CONSOLIDATED CASES)

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7) and the Court's order of December 4, 2006, I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 14824 words.

NANDAN M. JOSHI
COUNSEL
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418–1740 (TELEPHONE)
(202) 418–2819 (FAX)

July 5, 2007

APPENDIX 1
CONSTITUTIONAL AND STATUTORY PROVISIONS

Contents

1. Article I, section 7, clause 2 (the Presentment Clause) of the United States Constitution provides in relevant part as follows:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law.

2. 5 U.S.C. § 551(13) provides as follows:

> "[A]gency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

3. 5 U.S.C. § 706 provides in relevant part as follows:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

4. 28 U.S.C. § 2342(1) provides as follows:

> The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47.

5. 28 U.S.C. § 2344 provides as follows:

> On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of—
>
> (1) the nature of the proceedings as to which review is sought;
> (2) the facts on which venue is based;
> (3) the grounds on which relief is sought; and
> (4) the relief prayed.
>
> The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

6. 28 U.S.C. § 2349(a) provides as follows:

> The court of appeals has jurisdiction of the proceeding on the filing and service of a petition to review. The court of appeals in which the record on review is filed, on the filing, has jurisdiction to vacate stay orders or interlocutory injunctions previously granted by any court, and has exclusive jurisdiction to make and enter, on the petition, evidence, and proceedings set forth in the record on review, a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency.

7. Section 10 of the Communications Act of 1934 (47 U.S.C. § 160) provides as follows:

> SEC. 10. COMPETITION IN PROVISION OF TELECOMMUNICATIONS SERVICE.
>
> (a) REGULATORY FLEXIBILITY.—Notwithstanding section 332(c)(1)(A) of this Act, the Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that—
>
> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications

service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.

(b) COMPETITIVE EFFECT TO BE WEIGHED.—In making the determination under subsection (a)(3), the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.

(c) PETITION FOR FORBEARANCE.—Any telecommunications carrier, or class of telecommunications carriers, may submit a petition to the Commission requesting that the Commission exercise the authority granted under this section with respect to that carrier or those carriers, or any service offered by that carrier or carriers. Any such petition shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) within one year after the Commission receives it, unless the one-year period is extended by the Commission. The Commission may extend the initial one-year period by an additional 90 days if the Commission finds that an extension is necessary to meet the requirements of subsection (a). The Commission may grant or deny a petition in whole or in part and shall explain its decision in writing.

(d) LIMITATION.—Except as provided in section 251(f), the Commission may not forbear from applying the requirements of section 251(c) or 271 under subsection (a) of this section until it determines that those requirements have been fully implemented.

(e) STATE ENFORCEMENT AFTER COMMISSION FORBEARANCE.—A State commission may not continue to apply or enforce any provision of this Act that the Commission has determined to forbear from applying under subsection (a).

8. Section 402(a) of the Communications Act of 1934 (47 U.S.C. § 402(a)) provides as follows:

> Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this Act (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of title 28, United States Code.

9. Section 405(a) of the Communications Act of 1934 (47 U.S.C. § 405(a)) provides in relevant part as follows:

> After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 5(c)(1), any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 5(c)(1), in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass.

APPENDIX 2
NON-RECORD MATERIAL

Contents

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

March 12, 2007

The Honorable Daniel K. Inouye
Chairman
Committee on Commerce, Science and Transportation
U.S. Senate
510 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Ted Stevens
Vice Chairman
Committee on Commerce, Science and Transportation
U.S. Senate
254 Russell Senate Office Building
Washington, D.C. 20510

Dear Chairman Inouye and Chairman Stevens:

Please find enclosed my responses to the post-hearing questions asked in your letters of February 9 and February 15, 2007.

Please contact me if I can be of any further assistance.

Sincerely,

Kevin J. Martin
Chairman

A-5

Questions for the Record from Senator Daniel K. Inouye
Chairman, Senate Committee on Commerce, Science and Transportation
to Chairman Kevin J. Martin, FCC
Hearing with Federal Communications Commission
February 1, 2007

1.) In March, 2005, the FCC allowed a Verizon forbearance petition to become effective by operation of law. Because there was a vacancy on the Commission at that time and a 2-2 split among Commissioners, Verizon was able to gain regulatory relief through Commission inaction.

- **Does the current process regarding the disposition of forbearance petitions in the absence of a Commission majority essentially allow petitioners to write the terms of their relief?**
- **Is it fair in such situations to allow petitioners to amend the scope of their requested relief after the period for comment on the original petition has concluded?**
- **Should forbearance petitions be denied in the absence of an order approved by a majority of Commissioners?**
- **What effect will government recusal rules have on the ability of Commissioner McDowell to participate in other pending or future forbearance proceedings in which his former employer, Comptel, is a party or otherwise participates?**

RESPONSE:
Section 10 of the Act sets forth the standard by which the Commission is directed to evaluate petitions for forbearance. Section 10 also establishes a process by which petitions under this section "shall be deemed granted if the Commission does not deny the petition" within a maximum of 15 months. I believe that it is preferable for the Commission to reach a majority view on any forbearance petition and issue a decision affirmatively granting or denying it, in whole or in part. Such official action should be in the form of a written decision issued by a majority of Commissioners.

Since I became Chairman, the Commission has resolved seven forbearance petitions by unanimous Commission action. Although the Commission generally has been able to reach majority decisions on orders disposing of forbearance petitions, my colleagues and I were unable to do so with regard to the petition that Verizon had filed. The statutory deadline on that petition was March 19, 2006. More than three weeks prior to the deadline, I shared with my fellow Commissioners a draft order that would have granted in part and denied in part Verizon's Forbearance Petition. The Commission was engaged on this issue but, by a recorded 2-2 vote, did not adopt the draft order. Without a majority of the Commission agreeing to an order disposing of Verizon's Forbearance Petition, the petition was "deemed granted" on March 19th because the Commission had not taken any action on that petition. On March 20th, the Commission issued a News Release memorializing the effect of its inability to agree to an order disposing of the petition. At that time, all of the Commissioners took the opportunity to issue statements explaining their reasoning.

In the absence of an order disposing of a forbearance petition approved by a majority of Commissioners, a petition is deemed granted pursuant to section 10(c) of the Act. The forbearance petition defines the outer scope of the relief that a petitioner may receive through a grant that is deemed to occur through operation of law. A petitioner may narrow its request for relief through its subsequent submissions.

The grant of Verizon's petition by operation of law is currently on appeal before the United States Court of Appeals for the District of Columbia Circuit. Subject to the outcome of that appeal, the Commission will apply the statutory forbearance criteria as written.

The 2-2 vote in the Verizon Forbearance Proceeding occurred before Commissioner McDowell joined the Commission, so the government recusal rules had no bearing on the outcome there.

2.) One of the biggest challenges we face over the next 2 years is moving our nation from analog to digital television with minimal consumer disruption. I understand that the FCC is currently receiving comment on its Proposed Final Table of DTV allotments, proposing final digital channels for TV broadcast stations. However, even after that is final, additional actions will be needed to complete the transition.

- **Given the enormity of the task before us, what action is the Commission taking and what action should it take to ensure that our country is ready in February 2009?**
- **Would you be willing to provide the Committee with quarterly reports on actions taken by the FCC to prepare for the digital transition?**

RESPONSE:
One of the most important things the Commission can do to prepare for the digital transition is to ensure that all cable subscribers are able to view the signals of broadcast stations after the transition.

The Commission has completed several important steps to accomplish the digital television ("DTV") transition, and we are continuing to take actions to help ensure that Congress's deadline of February 18, 2009 is achieved with minimal consumer disruption. First, the Commission established deadlines by which all television stations must build their digital broadcasting facilities. As of February 2007, 93 percent of full-power television stations are on the air with a digital signal. Second, the Commission established channel election procedures by which stations determine their post-transition channels. Third, the Commission mandated that, as of March 1, 2007, all television receivers manufactured in the United States or shipped in interstate commerce must have an integrated digital tuner.

As you note, the Commission's next objective is to adopt the final DTV Table of Allotments, which will provide all eligible stations with channels for DTV operations after the transition. This rulemaking proceeding is underway, and reply comments were filed on February 26, 2007. We also are initiating the final steps for full power stations to complete construction of their

A-7

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

JAN 31 2007

OFFICE OF
MANAGING DIRECTOR

Ms. Anne M. Staron
Legal Assistant
Willkie Farr & Gallagher, LLP
1875 K Street, NW
Washington, DC 20006-1238

Re: FOIA Request No. 2007-062

Dear Ms. Staron:

This is in reference to the above-captioned Freedom of Information Act (FOIA) request for all records, documents, communications and other materials, in any format, relating to certain matters regarding Commission voting procedures and the Petition of Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to their Broadband Services, WC Docket No. 04-440 (filed Dec. 20, 2004) ("Verizon Forbearance Petition").[1] Specifically, you requested:

1. Any vote by the Commission regarding the Verizon Forbearance Petition;
2. For such vote, (if any) that was taken, how each Commissioner voted:
3. Any draft orders that were circulated among the Commissioners regarding the Verizon Forbearance Petition; and
4. Voting procedures, rules, and practices applicable to Commission votes.

Below, in the order requested, is our response to each item.

Your first two requests concern votes in the Verizon Forbearance Petition. We have reviewed the FOIA (5 U.S.C. 552(a)(2)), the Communications Act as amended (47 U.S.C. 154 (j)), and the Commission's rules (47 CFR 0.455(c)(1)), all of which address public availability of the votes of the Commission. We do not believe these provisions require release of the record of such votes here because (i) a tie vote on a matter not previously decided by the Commission or staff does not result in any Commission action; (ii) there was no final vote; and (iii) the matter remains pending notwithstanding the fact that the petition was subsequently granted by operation of law. *See Michael Ravnitzky*, 17 FCC Rcd 23240 (2002) (withholding pursuant to Exemption 5 deliberative process exemption Daily Circulate reports of status of pending proceedings). Nonetheless in the circumstances of this proceeding, where the Commission has publicly announced the vote and the petition was subsequently granted by operation of law, a release of the records is appropriate. Accordingly, a copy of the voting record is enclosed.

[1] The requester granted the Commission an extension until February 2, 2007 to submit a response.

A-8

Item three of your FOIA request seeks "[a]ny draft orders that were circulated among the Commissioners regarding the Verizon Forbearance Petition." The Wireline Competition Bureau has identified such documents, which we are withholding from public inspection pursuant to the deliberative process privilege of Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5). Drafts by their very nature are predecisional and deliberative because they reflect a tentative view and are subject to later revision. *Exxon Corp. v. Dept. of Energy*, 585 F.Supp. 690 (D.D.C. 1983). The process by which a draft document is refined and edited into a final version is distinctively deliberative and protected under Exemption 5. *See National Wildlife Federation v. United States Forest Serv.*, 861 F.2d 1114, 1122 (9th Cir. 1988); *Lead Industries Ass'n v. OSHA*, 610 F.2d 70, 86 (2d Cir. 1979).

The drafts at issue were prepared by staff for Commission consideration, but were never adopted. Release of these materials could lead to public confusion over issues as they do not represent the Commission's final decisions. Release of factual material contained in these records could also compromise the Commission's internal deliberative process because it is inextricably intertwined with opinions and conclusions chosen by Commission personnel to impart in the course of advising their colleagues and superiors during the evolving stages of the drafts. Disclosure of the above-mentioned materials would constitute an unjustified and harmful intrusion into the Commission's deliberative process. For these reasons, we must deny item three of your request.

Finally, in item four you seek "[v]oting procedures, rules, and practices applicable to Commission votes." As to the Commission's voting procedures, the FOIA requires procedures that affect the public to be made public. 5 U.S.C. 552(a)(2)(c). The Commission's voting procedures are internal procedures that have no effect on the public—indeed these procedures are not included in the Code of Federal Regulations or in any public manual. Accordingly, we also deny item four of your request pursuant to Exemption 2 of the FOIA, exempting internal practices of an agency. 5 U.S.C. § 552(b)(2).

We are required by the FOIA, 5 U.S.C. § 552(a)(4)(A), and Section 0.470 of the Commission's rules, 47 C.F.R. § 0.470, to charge FOIA requesters certain fees, depending on the classification of requesters into one of three categories defined in Section 0.466 of the Commission's rules, 47 C.F.R. § 0.466. The categories are (1) commercial use requesters; (2) educational and noncommercial scientific institution requesters and requesters who are representatives of the media; and (3) all other requesters. You have been classified as a "commercial use" requester and as such you are responsible for the payment of search and review time, plus the cost of duplication. 47 C.F.R. § 0.460. However, the fees associated with processing the request are minimal, therefore pursuant to Section 0.470(f) of the Commission's Rules, 47 C.F.R. § 0.470 (f), no fee will be charged for your request.

A-9

You may seek review of this decision by filing an application for review with the Office of the General Counsel, 445 12th Street, SW., Washington, DC 20554, within 30 days of the date of this letter. *See* 47 C.F.R. §0.461(j).

Sincerely,

Anthony J. Dale
Managing Director

cc: FOIA Officer

Enclosure

A-10

CLASPlus VOTE SHEET
CIRCULATE ITEM NOT ADOPTED

FOR PUBLIC USE

ACTION BY CIRCULATION

Minute Number: WCB_C_030D_06

Title: Verizon Petititon for Forbearance from Title II and Computer Inquiry re Broadband Services

Type of Document: MO&O

Bureau Contact: WILLIAM KEHOE
Bureau Office: WCB

Date Adopted:
Docket Number: 04-440

COMMISSION ACTION

Commissioner:	Vote:	Statement:
Martin	Approve	☑
Copps	Dissent	☑
Adelstein	Dissent	☑
Tate	Approve	☑
		☐

Marlene H. Dortch
Secretary

A-11

APPENDIX 3

In re Radio-Television News Directors Association
No. 97–1528, 1998 WL 388796 (D.C. Cir. May 22, 1998)

In re Radio-Television News Directors Ass'n
C.A.D.C.,1998.
NOTICE: THIS IS AN UNPUBLISHED OPINION.(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTADC Rule 28 and FI CTADC Rule 36 for rules regarding the publication and citation of unpublished opinions.)
United States Court of Appeals, District of Columbia Circuit.
In re: RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION and National Association of Broadcasters, Petitioners
No. 97-1528.

May 22, 1998.

On Petition for Writ of Mandamus Directed to the Federal Communications Commission.

Before SENTELLE, HENDERSON, and ROGERS, Circuit Judges.

JUDGMENT

PER CURIAM.

***1** This matter came on to be heard upon the petition of the Radio-Television News Directors Association and the National Association of Broadcasters seeking a writ of mandamus compelling the Federal Communications Commission to act on a Petition for Expedited Rulemaking filed on August 25, 1987. While the issues presented raise no need for a published opinion, they have been accorded full consideration by the court. *See* D.C.Cir. Rule 36(b).

It appearing to the court that the Commission fifteen years ago first proposed the repeal or modification of its personal attack and political editorial rules, 47 C.F.R. §§ 73.1920, 73.1930, 76.209(b), (c), (d); Repeal or Modification of the Personal Attack and Political Editorial Rules, 48 Fed.Reg. 28295 (proposed June 21, 1983); and that a Petition for Expedited Rulemaking has been pending with the Commission for over a decade;

It further appearing that the Commission on August 8, 1997, publicly announced its inability to reach a consensus on these issues; that four new Commissioners subsequently joined the Commission after the departure of their predecessors; and that the newly reconstituted Commission once again issued a public notice on May 8, 1998, announcing the recusal of one Commissioner, and the inability of the Commission to resolve these issues because of a deadlock between the four participating Commissioners;

It further appearing that denial of a petition due to a deadlocked vote by members of a governing body constitutes final agency action that is reviewable by this court, *see* *Democratic Congressional Campaign Comm. v. Federal Election Comm'n*, 831 F.2d 1131 (D.C.Cir.1987);

It further appearing that the Commissioners who voted against repeal or modification of these rules "must provide a statement of their reasons for so voting" in order to make judicial review "a meaningful exercise," *Federal Election Comm'n v. National Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C.Cir.1992); *Democratic Congressional Campaign Comm.*, 831 F.2d at 1134-35; and

It further appearing that the FCC, through counsel, stated in open court that it has no objection to the entry of this order;

It is hereby ordered that the FCC shall submit the final results of a formal vote on the Petition for Expedited Rulemaking to this court within thirty days of the entry of this judgment, and shall include a statement of reasons from any Commissioner voting against repeal or modification of the Commission's rules. Except for the order herein granted, the petition for issuance of a writ of mandamus is denied without prejudice to its renewal should the FCC fail to comply with this order.

C.A.D.C.,1998.
In re Radio-Television News Directors Ass'n
159 F.3d 636, 1998 WL 388796 (C.A.D.C.), 333 U.S.App.D.C. 46

END OF DOCUMENT